United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

77-7220

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CARL F. HOLLANDER

Plaintiff-Appellant

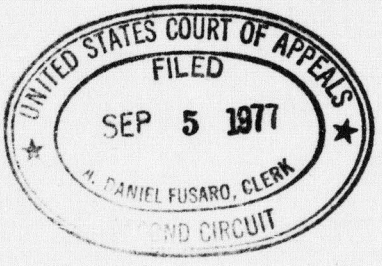
-against-

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

Defendant-Appellee

REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

(On appeal from the United States District Court, Southern District of New York)



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REPY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

MONY's brief does not repeat, at least not in express terms, the contentions it made in the court below about its absolute discretion as to the grant of Allowances, or that the Plan is a mere non-contractual gratuity because it is paid for by MONY. Therefore, the many authorities cited in Hollander's main brief about such provisions being contractual in nature, and the need for avoidance of arbitrary action in administering them, stand uncontested.

Moreover, MONY offers no refutation whatever of Hollander's showing in his main brief as to the salary savings which could be reasonably anticipated as the result of his termination.

MONY now relies primarily on its version of the facts, by emphasizing the actions it took in the cases of other attorneys, and many other employees who were not in Hollander's category as to age and length of service.

As to the other attorneys, some of them were not in the categories established by MONY on discovery as being pertinent to the issues involved in this action, and that there was no proof as to what other consideration they received upon termination. These claims are set forth in detail on pp 7-8 of Hollander's main brief, and will not be repeated here.

Even assuming, without conceding, MONY's version as to the treatment of such attorneys, the weight and impact of Hollander's proof with respect to the grant of the Allowance to others in his category is not affected. Reference is again made to Tab A of MONY's Response to Interrogatories, p A-5. Tab A sets forth the actions taken by MONY with respect to the granting of Allowances under the Plan to employees who had had 20 or more years of service upon termination. With respect to such of those employees who were also between the ages of 55 and 62 (55 being the age of entitlement for Early Retirement Benefits, and 62 being the cutoff age under the Termination Allowance Plan,) and aside from the 2 attorneys in that age and service category, 75 of 78, or 96.15%, were awarded the Allowance!

The extreme divergance between the treatment of attorneys and other employees is apparently accounted for by MONY's heavy reliance on the recommendations of the head of the Department in which the terminating employee worked. Such dependence was emphasized in the testimony of Thomas Davis, pp A-73-74, 76, and 78. This might be the reason for such divergance, but it certainly is not a legal excuse for practices which clearly involve unjust discrimination. If MONY is not permitted to take arbitrary actions under the Plan, as Hollander maintains, then it cannot treat the employees of one Department, such as attorneys, differently from employees of another Department.

Differentiation on the basis of age and length of service, as part of MONY's apparent policy to encourage Early Retirement is entirely another matter. The point to be borne in mind in this connection is that Hollander claims to be entitled to be treated as were the overwhelming majority of terminating employees in his category - those between the ages of 55 and 62, and with 20 or more years of service. He does not feel that the actions for those at a younger age (e.g as reflected in MONY's 60 percent figure, or by the only 3 out of 12 who, as shown by Tab A, who received the Allowance, even though such under age 55 employees had had 20 or more years of service, should be regarded as in any way applicable to his case. Instead, he maintains that the contrast in treatment as between those over and under age 55 is clearcut proof that MONY's practical construction of the Plan was to regard it as an adjunct to its Early Retirment Plan, and to give the Allowance to just about everybody over 55.

MONY misrepresents the evidence when it asserts, on page 4 of its brief, that Hollander testified that he "in no way relied upon the existence of the Plan to continue his employment." Hollander did not use these words, or any words of like import, in his testimony. Instead, he said several times that it was his understanding that just about everyone in his category as to age and length of service had been receiving it, and that he, and those with whom he talked, some of whom worked on the administration of the Plan, knew of

no exceptions. (pp A-26-31).

On the reliance point, Hollander maintains that no specific proof of it is legally required, See Hadden v. Consolidated Edison Co., 34 N.Y. 2d 88, 356 N.Y.S. 2d 249, (N.Y. Ct. of App., 1974), where the Court said that the consideration for the employer's promise is his continuation at work. No mention was made as to the necessity of specific proof of reliance in that case or in the others cited in Point II of Hollander's main brief.

Also, in this connection, the recent decision in Dangott v. A.S.G. Industries, Inc., 558 P. 2d 379 (Okla. Sup. Ct., 1976), which has just come to Hollander's attention, is especially significant. After first pointing out that a termination allowance plan is contractual in nature, and that its provisions are to be interpreted in favor of the employees, the Court said (p. 382):

> "Defendant, ASG Industries, suggest plaintiff had no knowledge of his right to severance pay, or if he had knowledge, such knowledge was of such short duration (approximately one month) that he could not have relied upon Art. VI #4 of the administrative procedure so as to have a vested right thereunder. We might be impressed with such argument if we were dealing in other contract areas such as sales of real estate or personalty. **** But here we deal with an employment contract not negotiated by a strong and aggressive union but concerning non-union or administrative personnel. Construing such contracts most strongly against the employer as suggested in Frietsche v. First Western Bank and Trust and Sigman v. Rudolph Wurlitzer, supra, we find an enforceable contract existed under the facts of this case.
>
> ASG promulgated the controversial administrative procedure, #9-3-29 and sent it to supervisory parties for no other purpose except to give notice and impart knowledge of it to its employees, and thus stabilize and promote a contented work force. Although plaintiff did not have actual knowledge of its provisions until shortly before his termination, publication of #9-3-29 is the equivelent of constructive knowledge on the part of all employees not specifically excluded. In Anthony v. Jersey Central Power and Light Company, 51 N.J. Super. 139, 143 A. 2d 762, 766 (1958) the court said:

'It makes no difference that the severance pay plan was promulgated after the plaintiffs had been employed for some time by defendant. Since the employment was always at will, any announcement of a change in or addition to the compensation of the employees of any form followed by the continuance of the employees in employment constituted an effective and binding agreement at the new terms for the service rendered thereafter. Consequently, once defendant improved the terms of compensation for plaintiffs' work by announcing the institution of the severance pay plan it must be assumed that plaintiffs were thereafter working for that benefit as much as for any other benefit or item of compensation held out to them as compensation by the employer. Suppose, instead of the institution of the severance pay plan, the employer had of its own volition announced a 10% increase in the salary of plaintiffs. Could defendant have thereafter repudiated its assumed obligation for the increase at the end of a pay period by the argument that plaintiffs had not relied thereon because they would have continued in their jobs even if the increase had not been announced? The question answers itself and also the defendant's contention here.'

********** It is fundamental that one who accepts the benefits of a contract must assume the detriments. Consideration is present, the benefit to ASG is a stable contented labor force, its price, pension rights or severance pay. Oklahoma by statute indicates such a factual situation will support a contract.

It is also suggested because the plaintiff obtained other employment after his termination he had not relied on the Administrative Procedure, #9-3-29, and thus there could be no enforceable contract. This argument is based on the assumption the plaintiff had to sit by and refuse employment, or lose what he might be entitled to. It presents an employee with a'Hobson Choice.'"

MONY also remarks that Hollander's acceptance of other employment would be a reason for denial of the Allowance (p 4). This has no relevvance to the terms of the Plan, which refer only to matters such as position abolition or salary savings. As stated in Answer to Interrogatory No. 11 of MONY's Response to Interrogatories, A-5, MONY did not, in conection with its taking action on the granting of Allowances make any inquiries, or conduct any investigation, as to what, if any, other employment its terminating employees might intend to take.

Indeed, any Plan provision or interpretation, or any other contractual provision which would so broadly prohibit or penalize engagement in non-competitive employment is regarded as illegal. See Karpinski v. Ingrasci,28 N.Y. 2d 45, 320 N.Y.S. 2d 1 (N.Y. Ct. of App., 1971).

On Hollander's claim of error in the exclusion of his compilation of salary record evidence, MONY says only that the record cards were admitted, and that Hollander did not testify as to its preparation. However, those cards, about 75 in number, were so voluminous and unwieldy as to make them virtually incomprehensible without some form of summarization. (That summarization shows that the employees in Hollander's category who received the Allowance, had on the average, received percentages of increase substantially in excess of what Hollander had received, during the last 3 years of employment, in each instance. It was an important item of evidence, because it was about the only way, other than the data shown on Tab A, in which Hollander could refute the self-serving testmimony of MONY employees.)

Hollander's offer of proof in connection with the attempted introduction of the compilation, as made by his attorney, clearly stated that Hollander had prepared it on the basis of his review of the salary record cards. If the Court felt that any testimony would render the compilation admissable, it had only to say the word. Instead, the Court's attitude was clearly an outright rejection of the compilation as admissable evidence.

CONCLUSION

Hollander respectfully maintains that he is entitled to the $21,867. claimed as the amount due him as Termination Allowance under MONY's Plan on the basis of salary savings which could reasonably have been anticipated, and on the basis of the treatment so uniformly accorded to other in his category as to age and length of service.